No. 603

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1920.

UNITED ZINC AND CHEMICAL COMPANY, *Petitioner*,

vs.

VAN BRITT AND SUSIE BRITT, *Respondents*.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

—and—

Brief in Support Thereof.

HENRY D. ASHLEY,
WM. S. GILBERT,
Attorneys for Petitioner,
502 Rialto Building,
Kansas City, Missouri.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1920.

UNITED ZINC AND CHEMICAL COMPANY, *Plaintiff in Error*,

vs.

VAN BRITT, ET AL., *Defendants in Error*.

NOTICE OF MOTION.

To F. J. Oyler and Fred Robertson.
Attorneys for Respondents:

TAKE NOTICE: That upon a certified copy of the transcript of the record herein and upon the annexed petition of the United Zinc & Chemical Company, petitioner, and upon the brief attached thereto, the undersigned, on behalf of the said petitioner, will present the annexed petition for a writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on the 15th day of November, 1920, at the opening of the court on that day, or as soon there-

after as counsel can be heard, and will ask for such other and further relief in the premises as may seem just.

Yours respectfully,

HENRY D. ASHLEY,
WM. S. GILBERT,
Attorneys for Petitioner,
502 Rialto Building,
Kansas City, Missouri.

Due and sufficient notice of the submission of the annexed petition is hereby admitted this..... day of October, 1920.

F. J. OYLER,
FRED ROBERTSON,
Attorneys for Respondents.

—IN THE—

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OCTOBER TERM, 1920.

UNITED ZINC AND CHEMICAL COMPANY, *Petitioner*,

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—and—

Brief in Support Thereof.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, the United Zinc & Chemical Company, respectfully shows:

1. Your petitioner is a corporation of the State of New Jersey and was the defendant below in the

above entitled action and the plaintiff in error in the United States Circuit Court of Appeals for the Eighth Circuit, on writ of error taken to review a judgment entered against it in the United States District Court for the District of Kansas, Third Division.

2. This suit was commenced in the District Court of Allen County, Kansas, at Iola, by writ of attachment levied January 17, 1917, to recover damages for the death of plaintiff's two sons, Edward and Allen, aged respectively 8 and 11½ years, caused by their entering on July 27, 1916, a pool of water which had formed by surface drainage, without petitioners knowledge in a cellar of a removed building, which had formerly been used by defendant as part of its plant for the manufacture of zinc spelter and sulphuric acid at Iola, Kansas.

3. Petitioner removed the case to the District Court of the United States on the ground of diversity of citizenship, plaintiffs claiming to be citizens of the State of Missouri.

4. At the trial of the case a verdict was rendered in favor of plaintiffs for the sum of $5000.00.

5. Thereafter on .... an order was made by said United States District Court of Kansas, allowing petitioner a writ of error to the United States Circuit Court of Appeals, Eighth Circuit. This writ of error (No. 5239) was dismissed by said United States Circuit Court of Appeals by its mandate dated April 1, 1919, because, through a misprision of the District Clerk the record filed in said cause failed to show that any final judgment had been rendered against the defendant.

6. Thereafter on motion of plaintiffs said District Court by its order nunc pro tunc dated May 5, 1919, ordered the clerk of said court to correct the record so as to show that a final judgment had been rendered against the defendant for $5000.00.

7. And thereafter and on May 5, 1919, an order was made by said United States District Court allowing defendant a second writ of error to the United States Circuit Court of Appeals for the Eighth Circuit.

8. It was further ordered by said United States District Court by and with the consent of both parties "that a full and complete transcript of all the evidence heretofore offered in this case, as set forth in the printed transcript of the record in this case on a former writ of error, (being No. 5239) heretofore pending in the United States Circuit Court of Appeals, and filed in that court August 22nd, 1918, together with the transcript of the proceedings which this day took place, as transcribed by Miss Elizabeth LaBar, be and the same is hereby signed, settled and allowed as the true bill of exceptions and made part of the record in this case."

And in pursuance of said order the following stipulation as to Transcript of Record and Briefs (R. 5430 pp. 26 & 27) was entered into by the parties through their attorneys of record and filed in said cause, viz:

"It is hereby stipulated by the parties that on the hearing of the writ of error in the United States Circuit Court of Appeals for the Eighth Circuit, now being prosecuted by defendant, printed copies of the record in this case on the first writ of error in said United States Circuit Court of Appeals, be-

ing No. 5239 and styled United Zinc & Chemical Company, Plaintiff in Error, vs. Van Britt and Susie Britt, Defendants in Error, may be used in their present shape as a part of the record on the writ of error now being prosecuted by defendant; and that as a return to the said second writ of error now being prosecuted by said defendant only the additional record made since the determination of said first writ of error by the United States Circuit Court of Appeals be certified up by the Clerk of the United States District Court and printed and used with the printed record in the former writ of error by the United Zinc & Chemical Company on the hearing of the writ of error now being prosecuted by this defendant.

It is also stipulated that briefs filed in said United States Circuit Court of Appeals for the Eighth Circuit by attorneys for both plaintiff in error and defendant in error may be used in their present shape on the writ of error now being prosecuted by defendant and that attorneys for plaintiff in error and defendants in error may file additional briefs in the manner and time as proposed by the rules of court.

This stipulation is made for the purpose of saving expense in the printing of the record and briefs and with the understanding that the plaintiffs below shall not thereby waive any right to contend that defendant is not entitled to prosecute a second writ of error.

Dated Fort Scott, Kansas, May 5, 1919, and endorsed Filed in the District Court on May 5, 1919."

9. On December 5, 1919, the case was argued before the United States Circuit Court of Appeals

for the Eighth Circuit sitting at St. Louis, Missouri, which court affirmed the decision of the United States District Court by a judgment of affirmance entered of record April 29, 1920.

10. Thereafter plaintiffs in error on June 23, 1920, duly filed in said court a petition for rehearing, which petition for a rehearing was denied by said Court on August 2, 1920.

11. The following facts were undisputed except such as we have herein stated were in controversy:

The petitioner owned twenty (20) acres of land on the outskirts of Iola, a small town in Kansas. From 1902 to 1910, petitioner maintained thereon a zinc smelting plant for the manufacture of spelter and sulphuric acid. Its principal plant was located at Argentine, Kansas. In the latter part of 1910 petitioner ceased manufacturing at Iola, and between September, 1910, and January 1, 1911, removed all its machinery, buildings, and personal property. It discharged its employees or removed them to its plant in Argentine.

The death of plaintiff's sons occurred in the basement of what was called the "tower" building, from which the entire super-structure had been removed, in the Fall of 1910. The "tower" building, while the plant was in operation, contained a Glover tower, and two Gay-Lussac towers, lead pipes, water tanks, pumps, machinery and other articles essential to the making of sulphuric acid by what is known as the "Chamber process." In these towers or chambers, the fumes from roasted ores met a weak solution of sulphuric acid, enriching it to a strength of 60° . . . The acid when made, passed automatically to

storage tanks which were located on a railroad switch, some distance away. The whole process took place inside of lead pipes, and chambers, and no acid when made was spilled about the premises. This basement was 46 feet wide and 96 feet long, and within it near its center was an inner rectangular pit, 14 feet wide and 38 feet long, with its longest sides parallel to the longest walls of the basement. The basement was 4½ feet deep and the inner pit was 5 feet deeper or about 9½ feet deep. Surface water, by reason of the stoppage of a drain, found access into this basement through a door way on its northeast side. This accumulated water at the time of the accident was about 2 feet deep in the basement proper and 7 feet deep in the pit. This basement stood in about the middle of the 20 acre tract and could not be seen from the roadway or until one got well into the 20 acre tract.

The 20 acre tract on which this basement stood was a barren waste, unrelieved by any sort of vegetation and littered with brickbats, scraps of metal and rubbish of every sort from the debris of the wrecked plant.

On the afternoon of July 27, 1916, nearly five years after the premises had been vacated by petitioner, plaintiffs accompanied by their four children, having passed through Iola in a prairie schooner, made a camp on some vacant land, a few hundred feet south of petitioner's abandoned factory site.

Plaintiff Van Britt testified that his younger son spent the night preceding the accident at his (plaintiff's) brother's house, who lived northwest of petitioner's land. And that on the day of the accident, he had sent his elder son to fetch him home.

The evidence shows that there is a roadway

running through petitioner's tract from northwest to southeast, which was about 120 feet west of the basement. This path or roadway had been made by petitioner's employees and others and was used by people as a short cut. From this path the basement and its contents were not visible.

On the afternoon of the day of the accident a group of four boys were passed travelling along this path going in a southeasterly direction by several witnesses, who were going in the opposite direction. The boys when encountered were then about a block and a half north of the basement. A short time afterwards, these witnesses heard calls for help from the direction of the basement and on going to the rescue, they were told by two little boys who were crying, that their companions were in the water. Ernest Dalton, a witness, upon arrival at scene saw a boy going down and rescued him. This proved to be Allen Britt, the elder son, who lived till the following day and died from gastro intestinal irritation of the stomach and bowels. The younger son Edward was dead before his body was recovered. The rescuers who could swim and remained in the water, some of them for 15 minutes, and who dove repeatedly suffered only slight irritations of the skin and mucous linings, which were temporary and caused no permanent injury.

There was no testimony to explain just how the boys met their death. They were naked and evidently had entered the water for a bath. The water until the pit was reached which was a rectangle 38 feet by 14 feet lying in the middle of the basement which was a rectangle 96 feet by 40 feet, was only 2 feet deep. The testimony of the rescuers was that they felt a burning sensation as soon as they enter-

ed the water. Van Britt, their father and one of the plaintiffs, testified that the boys could swim.

The death of Allen Britt from intestinal irritation after his rescue from drowning, and the testimony of experts, proved that the water in the basement was contaminated by chemicals. The evidence as to how this contamination was caused, was conflicting. The testimony shows that during the time the plant was in operation, no sulphuric acid was permitted to escape. The evidence regarding the condition in which petitioner left the premises when abandoned, January 1, 1911, is conflicting.

One of plaintiffs' witnesses testified that when the lead pipes were removed from the tower building probably a hundred to one hundred and fifty barrels of acid drained into the pit; another testified that sulphuric acid in cakes (?) was dumped into the pit to an amount he estimated at 150 barrels. On the other hand petitioner's Superintendent no longer in its employ but who was in charge of the wrecking, testified that he caused the workmen to dump into the pit 3 or 4 barrels of air slacked lime for the purpose of absorbing what little acid was spilled during the dismantling of the pipe lines so that the men could walk around and not burn their shoes; that sulphuric acid was then worth $10 per ton and that a barrel would hold 800 pounds and was worth $4. There was also evidence that during the operation of the plant the only waste came from the nitric acid room, that this residue, was like soft soap when hauled out and until it caked, and that after it was caked it was hauled to the north end of the lot about 425 feet northwest of the tower building. That this was soluble in water and during the operation of the factory, a ditch had been dug to car-

ry away the surface water which came in contact with this refuse. That the stuff that would run down this drain was, light colored, milky like color. There was also evidence that if this drain became stuffed up, the surface water would be diverted so as to flow into the basement. There was a substantial fence about petitioner's tract at the time the plant was removed, but this had entirely disappeared at the time of the accident.

No evidence was offered to show that any children had ever been seen on petitioner's land prior to the accident.

The testimony as to the appearence of the water in the basement was conflicting. Some testified that it was greasy, and was littered with refuse and discolored. Others that it was clear and looked like ordinary water.

12. At the conclusion of the testimony the trial judge, after refusing all petitioner's requests to charge, and after charging the jury orally at length, in order to give petitioner an opportunity to interpose a specific objection to so much thereof as was especially objected to by petitioner, recapitulated his charge to the jury as follows:

"That the law excuses a child of immature years from the same obligation in regard to trespassing on others property that it does an adult. The adult knows more about property lines, property rights, than does the immature child. And if these children, being camped there with their parents were attracted onto these premises, *although they may not have seen this pool, when they were off the premises*, yet, if anything, curiosity, or otherwise, brought them upon the premises of the defendant, *and then*

they saw this pool, and on account of the weather, its apparent healthfulness and condition, was attractive to these children to go in bathing, and they were thus allured to enter the *pond*, but still, if the *pond* was of the character charged here by the plaintiffs in this case, and they thus lost their lives, *the defendant would be liable if it knew this pool was standing there thus poisoned, or, if by the exercise of reasonable caution and prudence in the maintenance of its property it should have so known;* that is to say, if it knew it left there these poisonous substances, which mixed with this water would become impregnated in this pond, still, in such event, although the children may not have seen this pond from the highway, the defendant would be liable if the pond was left by defendant wholly unguarded. * * * * *

I say this: If you left there on your premises poisonous substances, which, by leaving the basement here, the building torn down, the roof torn off, etc., and which the elements would naturally gather up and deposit in this basement, I say if you knowingly left such poisonous substances there on your premises, which the natural operation of weather or water would gather up and deposite in this basin, you would be presumed to know the condition as it existed."

The Court of Appeals in its opinion in 264 Fed. 785, after stating that the trial court had instructed the jury that the defendant had a right to maintain a pond of water on its premises, that if the water in the pool had not been poisonous but had been pure water and the children had gone into it in that condition and had been drowned plaintiffs could not recover; that on the other hand if the pool was attractive to boyish instincts and impulses as a place to go

in bathing, and yielding they went in thus allured and their deaths resulted from the poison in the water, then the jury might find for plaintiffs; *that it was immaterial whether they saw or could see the pool before they entered upon the tract;* that if they had been of mature years they would have been trespassers and subject to a different rule, but that the law does not hold children of immature years to the same accountability as trespassers as it does adult persons, approves the instructions given and refused by the trial court, (though admitting that the question is a debatable one for the following reasons:)

1st. Because there was less hesitation in applying the principle *sic utere tuo* against a landowner as a basis for liability on account of injuries to children resulting from dangerous *attractions* which he places upon or suffers to continue on his premises where the thing complained of, is put to no useful, ornamental or other purpose of enjoyment, and

2nd. Because though assuming that the weight of the evidence disclosed that the pool (?) (abandoned cellar) could not have been seen by one off the premises standing in the nearest highway, or on the boundary line, or in the paths, or before they went on defendant's land; because the trial court doubtless had in mind two things, (a) that the public passed over it at will, so much so as to beat paths across it, and the further fact of its nearness to the homes of families; and (b) the principle of law applied in cases like the one at bar, *that children of tender years are not classed with idlers, licensees or trespassers.*

13. Your petitioner respectfully shows the Court that the decision of said Circuit Court of Appeals "that children of tender years under no circumstances are classed with idlers, licensees or trespassers" is contrary to the decision of said Court in Duree v. Wabash Ry. Co., 241 Fed. 454, the last controlling decision of said court which was called to said court's attention by plaintiff in error on page 53 of its first brief and by counsel in oral argument and is not referred to or cited by said court in its opinion.

It is also contrary to the decision of the Circuit Court of Appeals for the 6th Circuit in

Felton v. *Aubrey*, 74 Fed. 350.

where a child was injured while in the right of way of defendant. Judge Lurton (afterwards Associate Justice of the United States Supreme Court) in delivering the opinion of the Court says at page 361 "If he was a trespasser, the fact that he was of immature years imposed no higher duty on the company until his danger was discovered, than if he had been an adult. The railway company was no more required to keep a lookout for infants than for adult trespassers."

It is also contrary to the recent decision of the Circuit Court of Appeals of the 2nd Circuit in McCarthy v. Railroad, 240 Fed. 602 which held that "An infant 7 years old killed on defendant's right of way was a trespasser and that his administrator could not recover for his death, the Court saying "Any person who goes upon the premises of another is a trespasser if he goes there out of curiosity or for his own purposes, and without invitation, express or implied, and not in performance of a duty to the de-

fendant. A child of tender years may be a trespasser."

In the case at bar the trial court instructed the jury that on account of the immaturity of the Britt boys, "if anything, curiosity or otherwise, brought them upon the premises of the defendant, and then they saw this pool and on account of the weather and its apparent healthfulness * * * * were allured to enter the pond, * * if the pond was of the character charged by plaintiffs, (contained poisonous ingredients) and they lost their lives, the defendant would be liable * * *.

The decision that a child cannot be a trespasser because of its immaturity is also contradictory to the decision of the Circuit Court of Appeals for the 4th Circuit in *Hastings v. Railroad Co.*, 143 Fed. 260 where a boy 8 years old was held to be a trespasser because he was on the defendant's premises without the invitation of defendant, but solely for his own convenience.

It is also contrary to a recent decision of the Circuit Court of Appeals for the Second Circuit in *Heller* v. *Railroad*, 265 Fed. 192.

14. Your petitioner respectfully shows that said Court of Appeals of the 8th Circuit in its opinion says upholding the charge of the trial court that "If the pool (?) was attractive to boyish instincts and impulses as a place to go in bathing and yielding (to temptation?) they went in thus allured; and their deaths resulted from the poison, then the jury might find for the plaintiffs; that it was immaterial whether they saw or could see the pool (?) before they entered upon the tract; that if they had been of mature years they would have been trespassers and subject to a different rule."

Citing *City of Pekin* v. *McMahon*, 154 Ill. 141, 39 N. E. 484. In that case vacant lots owned by the city were in a thickly settled part of the city. They had originally contained a water course, which the city deepened into a pit by removing sand. This pit filled with water and boys were accustomed to play there upon floating planks. The city had been notified of its dangerous character by parents who requested its removal; in spite of which this condition had continued for more than a year prior to the accident; and that there was an ordinance declaring such a water filled excavation a nuisance. Upon these facts the Court said:

"Where the land of a private owner is in a thickly settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit, or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years incapable of exercising ordinary care, *and he is aware or has notice of its attractions for children of that class* we think he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such obligations under such circumstances is merely to apply the well known maxim, *sic utere tuo ut alienum non laedas.*" The Supreme Court of Illinois in *McDermott* v. *Burke*, 256 Ill. 401 to which we called the Court's attention in our first brief, while citing with approval said City of *Pekin* v. *McMahon supra* adds the following: "It is a necessary element of the liability that the thing which causes the injury is tempting to children and to constitute a means

of attracting them upon the premises, which the owner should anticipate. *The dangerous thing must be so located as to attract them from the street or some public place where they must be expected to be.* An owner would not be liable if he maintained something for his own use which might be dangerous, but which would only be found by children going upon his premises as trespassers."

A writ of certiorari is sought from this Court for the reason that the decision of the Court of Appeals involves the correct solution of "The Legal Liability of Landowners to Trespassing Children," a question of great importance which has caused much diversity of opinion among the courts of last resort throughout the United States, both State and Federal, depending upon whether they adhere to the rules established by the common law, or yielding to sentiment leave it to the jury to find *legal negligence* in cases where there is no *legal duty* to *exercise care.*

Since the decision of the United States Supreme Court in *Sioux City etc. R. R. Co.* v. *Stout,* 17 Wal. 657 in 1874; and the decision of the Supreme Court of Minnesota in *Keffe v. Railroad,* 21 Minn. 207 following it, in 1875, enunciated what has since become known at the "doctrine of the turn table cases," there has been great contrariety in the conclusions reached by the Courts of the United States, both State and Federal, with regard to the question of what is the liability of landowners towards children who enter upon the premises without the express invitation or assent, or actual knowledge of the owner.

At common law such children like adults were trespassers and the landowner owed them no duty, except not to bring force to bear upon them after

knowledge of their presence; or to wantonly injure them by setting traps or otherwise.

The common law imposed no duty upon the owner to use care to keep his property in such condition that persons going thereon without invitation might not be injured. In considering the question as to whether a duty existed towards trespassers no distinction was made between the case where an infant was injured, and one where the injury was to an adult.

The only exception to landowners' non-liability to persons entering without permission, was where he made changes in the condition of his land adjacent to a public highway, so as to endanger the safety of travellers who might without fault, accidentally stray from the highway.

"Liability of Landowners to Children Entering Without Permission,"—Hon. Jeremiah Smith,
11 *Harvard Law Review, Pages* 349-373, 434-448.

In the Stout case, a boy six years old, lost his foot while playing with some other boys on a turntable, which was located about 80 rods from the defendant's depot on its own land in a small settlement. Near the turntable was a travelled road passing through the depot grounds and near by was another travelled road. The turntable was not locked or fastened and revolved easily on its axis. An employee of the company testified that he had previously seen boys playing at the turntable and forbade them playing there, but he was not in charge of the table and did not notify his employer. There was an iron latch which kept the table in position by dropping into a slot, but it was broken at the time of the accident.

The case was tried below, (2 Dill. 294), before District Judge Dundy, and Circuit Judge Dillon. Judge Dillon in charging the jury stated that "This action rests and rests alone, upon the alleged negligence of the defendant, *and this negligence consists as alleged in not keeping the turntable guarded or locked.*" * * * *Mr. Justice Hunt characterized the charge of the trial court as "impartial and intelligent" and in reviewing the evidence says, "it was proved to the jury that several boys from the hamlet were at play there on this occasion and that they had been at play upon the turntable on other occasions and within the observation and to the knowledge of the employees of the defendant, and the jury was justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was in fact, on this occasion, so it was to be expected, that the amusement of the boys would have been found in turning this table while they were on it or about it. This would certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant."

In *Keffe* v. *Railrad Co.* (*supra*) the Court predicates the doctrine of the turntable cases upon an implied invitation, saying "that what an implied invitation is to an adult, the temptation of an attractive plaything is to a child of tender years."

In his work on Torts under the head of "Invasion of Rights in Real Property", Judge Cooley referring approvingly to *Keffe* v. *Railroad supra* said: * * * * * * In the case of young children and other persons not fully *sui juris*, an implied license might sometimes arise when it would not in behalf of others.

Thus leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it."

Cooley on Torts, 303.

In *Union Pac. Ry. Co.* v. *McDonald,* 152 U. S. 262 the Supreme Court of the United States cited and approved both the Stout case and the Keffe case, and quotes the paragraph above set out from Cooley on Torts. And while the McDonald case was actually decided against the defendant for the violation of a Statute of Colorado, which required all owners of coal mines to fence their slack piles, which not only appears from a careful reading of the Court's opinion, but also from the fact that Mr. Justice Brewer when the case was before him as Circuit Judge and which is reported in 35 Fed. 38 sustained a demurrer to the petition, (no statute of Colorado having been pleaded) on the ground that the petition did not state a cause of action within the ruling in the Stout case, since there was no implied license, no implied invitation to this boy (plaintiff) to come there nothing to attract him to this ash heap.

The Colorada Statute under which this case was decided is set forth in the report of the case below after plaintiff was forced to amend his petition because Judge Brewer had sustained a demurrer thereto.

McDonald v. *Union Pac. Ry. Co.,* 42 Fed. 579.

Your petitioner further respectfully represents that the charge of the trial court which was approved by said Court of Appeals did not keep within the limits of the doctrine of the turntable cases as laid down by this Court in the Stout case, and in

the Keffe case which this Court approved in Union Pacific Railway Company v. McDonald, which doctrine is recognized as an exception to the rule of the common law regulating the liability of landowners to trespassing children, but instructed the jury that it might find for respondents without finding any facts from which an implied invitation might have been inferred from petitioner to respondents' children before they entered upon petitioner's land, if the jury should find that after entering petitioner's premises they lost their lives through attempting to bathe in some rain water which had collected without petitioner's knowledge in an old abandoned basement situated on said premises, which water had become impregnated with poisonous chemicals without petitioner's actual knowledge, and then constituted a latent danger.

Said instruction under the facts in evidence amounting to a peremptory direction to the jury to find for respondents, and holding petitioner by reason of its ownership of the land, to the responsibility of an insurer of the safety of such children who for any reason should be impelled by their childish instincts to stray thereon.

Your petitioner respectfully represents that a writ of certiorari to bring up for a review the decision of the United States Circuit Court of Appeals for the Eighth Circuit should be granted for the following reasons:

(a) Because the decision of said court carries the doctrine of the "Attractive Nuisance" cases to the full limit of the most radical extension of that doctrine, which makes the landowner virtually an insurer of the safety of all children, who in obedience to childish whims and impulses intrude upon

his land, without his invitation express or implied, or actual knowledge and find there dangerous machinery, pools, pits, uncovered cisterns, or other latent dangers, by intermeddling with which they are injured or killed.

(b) Because the doctrine of the turntable cases, to which the "Attractive Nuisance" cases owe their origin, is itself an exception to the liability imposed upon landowners to trespassing children at common law, and has been repudiated by many courts of the highest standing and while followed by many courts of equally high standing, the tendency has been to restrict the doctrine to the narowest limits, and to put turntable cases in a class by themselves.

(c) Because the decision of said U. S. Circuit Court of Appeals is not in harmony with its own previous decisions as we have shown, nor with the decisions rendered by the federal courts in many other circuits, and it is of importance that said decision shall be carefully scrutinized and examined by this Court before it shall be permitted to become a precedent.

It is respectfully suggested that notwithstanding the case of Union Pacific Railway Company vs. McDonald, this is a case of first impression in this court, and the opportunity is here presented to put a *quietus* upon a dangerous heresy by keeping the federal courts within the well known landmarks of the common law, and by leaving changes in the law to be made by the legislature where they belong.

Wherefore your petitioner prays that this Honorable Court will grant its writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to bring up this case to this Honor-

able Court for such proceedings thereon as to this Honorable Court may seem just.

United Zinc & Chemical Company,
Petitioner.

By Henry D. Ashley.
Vice-President.

Henry D. Ashley and
William S. Gilbert,
Attorneys for Petitioner.

State of Missouri, County of Jackson, ss.

HENRY D. ASHLEY, being duly sworn according to law on his oath, says:

I am Vice President of United Zinc & Chemical Company, the petitioner named in the foregoing petition. The same is true of my own knowledge and belief, except in so far as it refers to the transcript of the case and the decisions of other courts, as to which matters my knowledge and information are received from the printed transcript of the case and from information given to me by the attorneys of said petitioner and except also as to the circumstances of the accident and the litigation resulting, as to which my knowledge is received from information given to me by the attorneys of said Chemical Company.

HENRY D. ASHLEY.

Subscribed and sworn to at Kansas City, Missouri, this October ..... A. D. 1920, before me, a Notary Public in and for said County and State duly commissioned and sworn, as witness my hand and official seal.

LEO WETHERILL,
Notary Public in and for
Jackson County, Missouri.

CERTIFICATE OF COUNSEL

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

HENRY D. ASHLEY,
Of Counsel with Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The question in this case is whether a landowner owning a large tract of unfenced land on the outskirts of a small town, and which it has for many years ceased using, must at its peril, keep said premises in such condition that they shall be free from danger to such children as shall enter thereon without its knowledge, or invitation express or implied.

The theory upon which the trial court submitted the case to the jury was that the children of plaintiffs could not be trespassers by reason of their immaturity and that petitioner should not only have anticipated their presence on its land, but owed them the duty to keep its land free from latent dangers, even though petitioner had no knowledge that any such danger existed, since its former use of said land had been such that in the light of subsequent events it should have anticipated that what happened was possible to happen.

The United States Circuit Court of Appeals for the Eighth Circuit, while conceding that the question was a debatable one, sustained the instructions of the trial court, (citing authorities to which we will call the Court's attention hereafter in detail) because (a) in its opinion "The principle *sic utere tuo* etc., may be carried against a landowner as a basis for liability on account of injuries to children resulting from dangerous attractions which he places upon or suffers to continue on his premises, * * * * where the thing complained of is, as here, put to no useful, ornamental or other purpose of enjoyment." and because

"(b) The public passed over it at will so as to beat paths across it, and the further fact of its nearness to the homes of families and because;

(c) The principle of law applied in cases like this is that children of tender years are not classed with idlers, licensees, or trespassers, citing,

2 *Sherman* v. *Redfield* on Negligence Sec. 705; *Pekin* v. *McMahon*, 154 Ill. 141."

1. We respectfully suggest that the maxim *sic utere tuo* which the learned Court applies to the case before it "with less hesitation because the thing complained of * * * is put to no useful, ornamental or other purpose of enjoyment," is not a legal principle which can aid in the solution of a perplexing legal proposition, but it is a moral precept, which as Mr. Justice Holmes says "Teaches nothing but a benevolent yearning," 8 Harvard Law Review 3; and which "Belongs" says Prof. Terry "to the class of extra-legal principles which we may call legislative, because they serve as guides to show how the law ought to be made."

Terry's Leading Principles of Anglo American Law, Sections 10 and 11:

> "The maxim *sic utere tuo ut alienum non laedas* is mere verbiage. A party may damage the property of another when the law permits; and it may not where the law prohibits: So that the maxim can never be appled till the law is ascertained; and when it is the maxim is superfluous."

See also The Use of Maxims in Jurisprudence, 8 Harvard Law Review, 13.

> "That maxim that a man must use his property so as not to incommode his neighbors,

only applies to neighbors who do not interfere with or enter upon it."

Frost v. *Eastern R. R. Co.*, 64 N. H. 220-222.

It refers only to "acts, the effect of which extends beyond the limits of the property."

Ratte v. *Dawson*, 50 Minn. 450-453.

2. We respectfully suggest that it is not an absolute legal truth that children of tender years are never classed with trespassers, but whether they are so classed or not depends upon the circumstances of each particular case.

Felton v. *Aubrey*, 74 Fed. 350.
Duree v. *Wabash Ry. Co.*, 241 Fed. 454.
McCarthy v. *Railroad*, 240 Fed. 602.
Hastings v. *Southern Ry. Co.*, 143 Fed. 263.
Heller v. *Railroad*, 265 Fed. 192.
Haray v. Mo Pac. R. Co. ~ 266 Fed 860.

The case at bar must be sustained if at all because it falls within the reason of the turntable cases as that doctrine is declared in *Sioux City etc., Ry Co.*, v. *Stout*, 17 Wal. 657; or within a modification or extension of the turntable doctrine which is commonly known as the "Attractive Nuisance" doctrine. Under this latter doctrine the landowner is held responsible if he maintains on his premises something which is dangerous to life and which is calculated to allure or entice children to enter the premises, where by contact with the things they may be injured.

Now these two doctrines at first seem to coincide; but in fact rest upon different grounds. In the turntable cases the child is technically a trespasser, but because of his inability to care for himself owing to want of discretion, the landowner

is made responsible if he knows of the presence of the child at this dangerous instrument and fails to take steps to protect him. In other words the law implies a license to the child where defendant knew of his presence. In the case of attractive nuisance, liability is imposed upon the landowner because in the eyes of the law he has caused the children to come upon his land; he has, by the maintenance of this attractive thing, impliedly invited them to enter, and must be responsible if they are injured as a direct result of this invitation. The attractive thing must be visible from off the land, for otherwise its maintainance does not invite the child to enter.

McDermott v. *Burke*, 256 Ill. 401, l. c., 406.

In the case at bar the trial court told the jury that "Although the children may not have seen this *pond* (?) from the highway, the defendant would be liable if the *pond* (?) was left by defendant wholly unguarded," but that "If anything, curiosity, or otherwise, brought them upon the premises of defendant and then they saw this pool and on account of the weather, its apparent healthfulness and condition was attractive to these children to go in bathing and *they were thus allured to enter the pond*? * * * and they thus lost their lives the defendant would be liable." * *

This certainly dispensed with the elaborate legal fiction that the landowner, having lured the child upon his premises, is estopped to deny that the child occupies the status of an invitee, upon which, the attractive nuisance theory is bottomed by those courts which are not satisfied to place their decisions wholly upon humanitarian grounds.

3. The learned Court of Appeals in answer to your petitioner that the record contained no proof of knowledge n the part of the owner that its tract of land was being used or visited, by the public or by children and that if the evidence shows such user or visitations they were wholly without invitation or consent, replies that on the facts adduced the *law imputes both knowledge and consent*, and in support thereof cites, the following cases:

Union Pac. Ry. Co., v. *McDonald*, 152 U. S. 262; 38 L. ed. 434,

where the opinion recites that the company had had for two years actual knowledge of the existence of the slack pit and of its dangerous condition and that children were allowed to go around the machinery where the shaft was. This case was really decided on a Statute of Colorado, which we have already noted.

In *Railway Co.*, v. *Curtz*, 196 Fed. 367.

The plaintiff 11 years old was thrown from a freight car stored on a public street in Tacoma where he was gleaning loose grains of wheat and that for more than 6 years children openly went into such empty cars and were never driven away by the Company's switchmen, but on the contrary were often directed by the switchmen where to find these cars, and that there was evidence tending to show that the Company knew that children were accustomed to sweep up the wheat in these empty cars, from which the Court concluded that there was evidence to go to the jury to show that plaintiff was a licensee and not a trespasser.

In *Chesko* v. *Delaware & Hudson Co.*, 218 Fed., 804: Defendant had a machine shop 6 feet from

a much travelled street. Its moving machinery was visible from the sidewalk through a wide double door. This door was kept open during warm weather and there was no guard, rail or screen to prevent the entry of children. The proofs showed that children were permitted to enter through this open door. Plaintiff aged 6 entered through this open door and while watching the men at work his hand was caught by an unguarded revolving cog wheel and injured.

The jury found "that the defendant had not exercised such judgment and care under the circumstances as a person of ordinary prudence would use in warding off children and guarding them against the danger that the *allurement* of the place might offer."

In this case the allurement confronted the child on the public street and there were men at work when the six year old child entered the machine shop, who could have excluded him at sight.

In *Roman* v. *City of Leavenworth*, 133 Pac. 551; 90 Kan. 379 plaintiff, a child 11½ years old was hurt by reason of a smouldering fire in a city dump. The City actually *knew* that children played there and were attracted by the dumping of spoiled fruit, but took no precautions to drive them away. This was obvious negligence. The child was excused by his tender years from contributory negligence.

K. C. v. *Liese*, 71 Kan. 283, 80 Pac. 626, follows the Price case, though Judge Cunningham who wrote the opinion of the Court in a dissenting opinion states that the Price case carries the turntable cases far beyond the danger limit. *Price* v.

Water Co., 58 Kan. 551 where the defendant's watchman permitted boys to play with a dangerous appliance used in a reservoir.

In *Light & Power Co.* v. *Healy*, 65 Kan. 798; 70 Pac. 884, the last case cited by said Court.

The record shows that the owner knew that children were accustomed to play there, yet failed to take precautions either to stop the practice or to protect the children from injuries.

In a Kansas case not cited by said Court, where a railroad company had its own stock yards fenced, and a child was injured on the premises, Chief Justice Horton held that *the company wouldn't be liable unless it knew or should have known that children were accustomed to play on the premises.* And in the absence of knowledge the Court refused to imply a license, distinguishing both *Railway Co.* v. *Dunden*, 37 Kan. 1 and the Stout case on the ground that the defendant companies in these cases knew that children had been in the habit of playing in the place where the injury occurred.

Among the jurisdictions of the highest Courts, which have disapproved and refused to follow the turntable and Attractive Nuisance cases are the following well considered cases:

Connecticut: *Wilmot* v. *McPadden*, 79 Conn. 367;

Massachusetts: *Daniels* v. *Railroad*, 154 Mass. 349; 13 L. R. A. 248; 26 Am. St. Rep. 253;

~~Michigan: *Iammuri v. Saginaw City Gas Co.*, 148 Mich. 27;~~

Montana: *Fusselman* v. *Yellowstone Valley Etc. Co.*, 53 Mont. 254;

an v. Iowa, 128 Mich 463

New Hampshire: *Frost* v. *Railroad Co.*, 64 N. H. 220; 10 Am. St. Rep. 396. Ann. Cas. 1918.

New Jersey: *D. L. & W. R. R. C.* v. *Reich*, 61 N. J. L. 635;

Friedman v. *Snare & T. Co.*, 71 N. J. L. 605;

New York: *Walsh* v. *Railroad Co.*, 145 N. Y. 301; 27 L. R. A. 724; 45 Am. St. R. 615.

The decision in this case was rendered by Judge Peckham (afterwards Associate Justice of the United States Supreme Court,) who carefully reviews the authorities cited by Mr. Justice Hunt in the Stout case and denies that they support the conclusions reached in the opinion.

This is a leading case and ably reviews the cases and arguments for and against the "Attractive Nuisance" doctrine.

Pennsylvania: *Gillespie* v. *McGowan*, 100 Pa. 150;

Rhode Island: *Paolina* v. *McKendall*, 24 R. I. 432;

Vermont: *Bottum's Admrs.* v. *Hawkes*, 84 Vt. 380; Ann. Cas. 1913 A. 1025 and Notes p. 1032; 35 L. R. A. (N. S.) 449.

The opinion in this case is exhaustive and especially well reasoned.

Virginia: *Walker* v. *Railroad*, 105 Va. 226; 8 Ann. Cas. 862; 4 L. R. A. (N. S.) 80; 115 Am. St. Rep. 871; 8 A. & E. Ann. Cas. 862;

West Virginia: *Conrad* v. *Railroad*, 64 W. Va. 177;

Ritz v. *Wheeling*, 45 W. Va. 267; 43 L. R. A. 148;

Uthermohlen v. *Boggs Run Co.*, 50 W. Va. 457; 55 L. R. A. 911; 88 Am. St. Rep. 884.

Among the States which have adopted and followed the doctrine of the turntable cases are:

Alabama: *Railroad* v. *Crocker*, 131 Ala. 584;

California: *Barrett* v. *Railroad*, 91 Cal. 296;

~~Connecticut: *Daley* v. *Railroad*, 26 Conn. 591;~~

Georgia: *Ferguson* v. *Railroad*, 75 Ga. 637;

Illinois: *Pekin* v. *McMahon*, 154 Ill. 141;

Iowa: *Edgington* v. *Railroad*, 116 Ia. 410;

Kansas: *Kansas Central Ry. Co.* v. *Fitzsimmons*, 22 Kan. 686;

Kentucky: *Branson* v. *Labrot*, 81 Ky. 638;

Minnesota: *Keffe* v. *Railroad*, 21 Minn. 207;

Missouri: *Koons* v. *Railroad*, 65 Mo. 592;

Nebraska: *A. & N. R. Co.* v. *Bailey*, 11 Neb. 332;

Ohio: *Harriman* v. *Railroad*, 45 Ohio St. 11;

South Carolina: *Bridger* v. *Railroad*, 25 S. C. 24;

Texas: *Evansich* v. *Railroad*, 57 Tex. 126;

Tennessee: *Railroad* v. *Cargille*, 105 Tenn. 628.

The following cases taken from jurisdictions which in earlier cases approved the turntable cases show that the tendency in them is to limit the doc-

trine strictly to turntable cases and not to extend it so as to embrace the so called "Attractive Nuisance" doctrine.

California: *Peters* v. *Bowman*, 115 Cal. 345;
Georgia: *Railroad* v. *Beavers*, 113 Ga. 398;
Minnesota: *Stendal* v. *Boyd*, 73 Minn. 53.

The Court says in this last case:

"The doctrine of the turntable cases is an exception * * * if it is to be extended to this case then the rule of non-liability of landowners to trespassers must be abrogated as to children and every owner of property must at his peril make his premises child proof."

Missouri: *Kelly* v. *Benas*, 217 Mo. 1.

The Court in an able opinion by Judge Lamm reviews the Missouri cases and states that the turntable doctrine, though established in Missouri, should be limited to the narrowest bounds.

Ohio: *Wheeling Etc. R. Co.* v. *Harvey*, 77 Ohio St. 235; 11 Ann. Cas. 981; 19 L. R. A. (N. S.) 1136; 122 Am. St. Rep. 903.

This also is a leading case.

Texas: *Dobbins* v. *Railroad Co.*, 91 Tex. 60; 38 L. R. A. 578; 66 Am. St. Rep. 859.

This also is a leading case.

Respectfully submitted in support of petition for a writ of certiorari.

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